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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1693

MILLARD V. IRWIN, Owner of the Yacht, "JOMIE",
Petitioner,

vs.

EAGLE STAR INSURANCE COMPANY, LTD.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. The Issue of Uniform Application of Marine Insurance Policy

Respondent's brief demonstrates as clearly as the Petition the need for clarification of the law by this Court to establish guidelines for interpretation of Marine insurance policies and resolve the conflicts currently plaguing the maritime industries growing out of varying applications of this Court's opinion in *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955).

We first discuss Respondent's contention that the Fifth Circuit held that Federal application of coverage for

latent defects under the Inchmaree clause is similar to that adopted by the Fourth District Court of Appeal in Florida in, *Egan* v. *Washington General Insurance Corp.*, 240 So. 2d 875 (Fla. App. 1970). If this were so, then the holding below would seem to be superfluous and pointless. However, in a lengthy opinion, the Fifth Circuit analyzed this Court's opinions in the several cases in order to conclude:

> "Having determined that the Florida decisional law should be applied to this case, we believe ourselves bound by the decision of the Fourth District Court of Appeal in *Egan* v. *Washington Insurance Corporation*, 1970, 240 So. 2d 875 * * *" (A. 12).

Respondent's brief does not meet the issue of how the Bench and the Bar are to apply this mandate to the various clauses of marine insurance policies in the many cases that arise in the Fifth Circuit's geographical area encompassing as it does the longest coastline, the most ports, and probably the largest volume of commercial shipping and pleasure boating of any Circuit. Since the holding is now binding in all of the districts of the Fifth Circuit, the scope of the opinion reaches far beyond the simple result in this case.

For instance, Louisiana must now re-examine its rule since that State concedes that its interpretation of the Inchmaree coverage differs from Federal maritime interpretation. *Anders* v. *Poland*, 181 So. 2d 879 (La. App. 1966), in which the court held it was required to follow Federal maritime law interpreting the Inchmaree Clause rather than its own narrower interpretation of latent defects from, *Schon* v. *James*, 28 So. 2d 531 (La. App. 1946).

Assuming that in Florida, as Respondent contends, there is no distinction between Federal maritime and State

application of the Inchmaree clause, this does not resolve the mandate to Bench Bar that marine insurance policies shall be interpreted by the decisional law of the various states or still the mischief inherent in such a holding, readily predicted by Gilmore & Black, Law of Admiralty.

The Fifth Circuit has applied *Wilburn Boat* to restrict coverage, exactly opposite to this Court's intended broadening of insurance protection to spread the burden of loss, by resorting to Florida Law to take away coverage, where Federal Law would, and did, allow it.

Respondent further misconstrues the petition in failing to meet the very point that in *Wilburn Boat*, this Court determined that the states may regulate marine insurance by statute, but only if such statute does not conflict with clear Federal decisional law, or if it is utilized it should be used only to provide coverage for a loss where a harsh application of Federal decisional law would deny coverage.

However, the Fifth Circuit has now extended the holding of *Wilburn Boat* to state decisional law, even when Federal general maritime law is available, and Respondent does not indicate how this extension and its probable application in 50 different ways can be resolved without this Court's intercession.

In the Petition at page 9, Petitioner omitted citation of the opinion of the Florida Third District Court of Appeal which follows the holding of that court *in Continental Ins. Co.* v. *Levinson*, 224 So. 2d 445 (Fla. App. 1969). The omitted citation is, *Lloyds of London* v. *Florida Longhorn, Inc.*, 230 So. 2d 725 (Fla. App. 1970).

As stated in the petition, the Third District Court of Appeal of Florida does not detail the facts of the *Florida Longhorn* case, but the holding does follow its *Continental Insurance* holding and conflicts with the Fourth District

Court of Appeal opinion relied upon in the opinion below. This can readily be determined from an examination of the appellate file which contains detailed findings of the fact by the trial judge interpreting the Inchmaree latent defect coverage for negligent installation of a connecting flexible hose between two ends of a water pipe, and allowed recovery as a latent defect because the wrong size clamps were used and the connection was hidden under insulation and not detectable.

II. Right to Remand for Resolution of Issues Reserved by Trial Judge

Respondent urges in its brief that Petitioner, not having appealed from the Trial Judge's reservation of ruling on a pertinent issue raised at the trial, i.e., estoppel and waiver, is now barred from raising this issue with this Court.

Respondent concludes that since no cross-appeal was taken, the issue is now dead and non-reviewable by this Court.

The import of this argument is that every appellee must cross-appeal to preserve undecided issues in case his judgment is vacated on appeal. Respondent thereby notes a dilemma in the rules, a trap not contemplated in their promulgation.

Petitioner does not believe that the rules of procedure or the statutes require every appellee to be placed in this dilemma.

The Petitioner won at the trial level and the Trial Judge felt it was unnecessary to rule on every issue raised at the trial, specifically stating he was not ruling on estoppel and waiver:

9. "This Court has reserved making a finding of fact as to the issue of waiver and estoppel due to the findings set forth above". (A. 4, A. 5).

However, when the Court of Appeals vacated the judgment, this issue became pertinent and the Petitioner, in moving for re-hearing, correctly requested the Fifth Circuit to remand the case to the District Court for resolution of the reserved issues.

The appeals court did not rule one way or the other and merely denied re-hearing. (A. 13).

It would seem therefore that the rules are either silent or defective to cover this type situation or it is covered and erroneously applied by the Court below.

This is a technical matter of procedure which requires this Court's attention for resolution.

1. Respondent's statement in its argument C that the issue was not reserved by the Trial Judge would seem to be in error.

CONCLUSION

It is respectfully submitted that this cause be reviewed to resolve Constitutional and procedural issue raised by the opinion below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief was mailed to WALSH, DOLAN & KRUPNICK, Attorneys for Respondent, 402 Court House Square Building, Fort Lauderdale, Florida this 26th day of July, 1972.

ARTHUR ROTH